NOT YET SCHEDULED FOR ORAL ARGUMENT

In the

United States Court of Appeals

for the

District of Columbia Circuit

15-1437

NEW YORK UNIVERSITY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

UNION OF CLERICAL, ADMINISTRATIVE AND TECHNICAL STAFF, NYU, LOCAL 3882, NYSUT, AFT, AFL-CIO,

Intervenor for Respondent.

ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD

FINAL BRIEF FOR INTERVENOR FOR RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Intervenor, Union of Clerical, Administrative and Technical Staff at NYU, Local 3882, certifies as follows:

A. Parties and Amici

Petitioner/Cross-Respondent is New York University. Respondent/Cross-Petitioner is the National Labor Relations Board. Intervenor for Respondent is Union of Clerical, Administrative and Technical Staff at NYU, Local 3882, and was the charging party in the underlying Board proceeding. No person or entity has sought to participate as *amicus curiae*.

B. Ruling Under Review

This case is before the Court on NYU's petition for review and the Board's cross-application for enforcement of the Decision and Order issued by the Board on November 30, 2015, and reported at 363 NLRB No. 48. The Union intervened on the side of the National Labor Relations Board.

C. Related Cases

The ruling under review has not previously been before this Court or any other court. Counsel is unaware of any related case currently pending.

DISCLOSURE STATEMENT

Union of Clerical, Administrative and Technical Staff at NYU, Local 3882 is not a corporation. It is a labor organization affiliated with the New York State United Teachers, AFL-CIO.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Briefs for NYU and the Board.

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* Authorities on which this brief chiefly relies are marked with an asterisk.

Statutes:

GLOSSARY

1. Board	The National Labor Relations Board
2. NLRA or Act	National Labor Relations Act
3. NYU	New York University
4. Union	Union of Clerical, Administrative and Technical Staff at NYU

STATEMENT OF PURPOSE

Intervenor for Respondent, Union of Clerical, Administrative and Technical Staff at NYU, Local 3882, New York State United Teachers, AFT, AFL-CIO ("Union"), the charging party in the underlying unfair labor practice proceeding, submits this brief in support of the National Labor Relation Board's ("Board") cross-application for enforcement of the Board's Decision and Order.[1] The Union adopts and relies upon the statement facts and arguments contained in the Board's brief and raises arguments herein that are not repetitive of but, rather, focus on the intent of the parties to give New York University ("NYU") some freedom to establish and change job descriptions while reserving the Union's right to bargain over job descriptions generally during the term of the Collective Bargaining Agreement ("Agreement").

STATEMENT OF ISSUE

Under the terms of the collective bargaining contract, did the parties intend to foreclose further bargaining over job descriptions and job description changes?

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[1] The Joint Appendix filed by Petitioner is refered to herein as "JA.".

SUMMARY OF ARGUMENT

In this case, Petitioner/Cross-Respondent NYU seeks to avoid bargaining over the effects of its decision to consolidate seven job titles in six library units into a single job title with shared job duties. The Board correctly found that NYU's failure to bargain over the effects of this decision violated Sections 8(a)(1) and (5) of the National Labor Relations Act ("the Act"), 29 U.S.C. §§ 158(a)(1) and (5). In so doing, the Board rejected NYU's claim that the Union had waived its right to effects bargaining and disagreed with *Enloe Medical Center v. NLRB*, 433 F.3d 834, 839 (D.C. Cir. 2005) ("*Enloe*"), in so far as the Court expressed the view in that case that when a union waives its right to bargain over a management decision it presumptively waives its right to bargain over the effects of that decision. NYU asks this Court to apply *Enloe* without regard to the terms of its own Agreement. Indeed, it asks the Court not to look too closely at the Agreement, but to begin its analysis with the premise that the Union waived its right to bargain over its decision to consolidate jobs.

The Court should reject NYU's invitation because even in *Enloe* this Court acknowledged that the parties' intent governs, and in this case the terms of the Agreement evidence the parties' intent to give NYU certain freedom to establish and change job descriptions, while reserving the Union's right to bargain over job descriptions and pay classifications during the term of the Agreement. Thus, the

premise of NYU's argument is flawed and the Enloe presumption does not apply. Although the General Counsel of the National Labor Relations Board, through its office of appeals, found that the Union waived its right to bargain over job description changes, this Court owes no deference to such finding and should draw its own conclusions based on its own interpretation of the Agreement. By its terms, the Agreement only allowed NYU to add "related" duties to existing positions, it did not authorize a consolidation and elimination of job titles with the result that employees with different skills sets would be unable to meet performance expectations. For this reason, the Board's effects bargaining order is consistent with the terms of the Agreement and should be enforced. *See Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 313 (D.C. Cir. 2003) (applying its own contract interpretation and enforcing the Board's effects bargaining order on other grounds).

With regard to NYU's claim that there were no effects to bargain, the Court should defer to the Board's findings and conclusions.

ARGUMENT

I. NYU'S BARGAINING OBLIGATION IS A MATTER OF CONTRACT INTERPRETATION WHICH THIS COURT MAY DECIDE *DE NOVO*.

In recent years, this Court and the Board have disagreed over the proper approach to determine whether an employer has an obligation to bargain over the effects of changes it makes to terms and conditions of employment when a collective bargaining agreement is in place. *See, e.g., Heartland Plymouth Court MI, LLC v. NLRB*, No. 15-1034, 2016 U.S. App. LEXIS 8164, at *2-3 (D.C. Cir. May 3, 2016)*; Enloe,* 433 F.3d at 838 . At the heart of this debate is the question whether the "clear and unmistakable" standard applies. In this Court's view it depends on the question presented: The "clear and unmistakable" standard applies if the question is whether the union contractually waived the employees' right to bargain; it does not apply if the question is whether the contract fully defines the parties' rights such that it is reasonable to conclude the employer fulfilled its bargaining obligation. *Dep't of Navy v. Fed. Labor Relations Auth.*, 962 F.2d 48, 57 (D.C. Cir.1992) In the Board's view, the "clear and unmistakable" waiver standard applies regardless. *Enloe,* 433 F.3d at 837-38.

What must be emphasized is that the Court does not disagree with the Board's approach in every case: "The Board's approach to determine whether a union has given up its right to bargain over a mandatory subject of bargaining is to

ask whether the union's 'waiver' of those rights is 'clear and unmistakable.' That proposition is not challenged by this court." *Enloe*, 433 F.3d at 837; *see also Dep't of Navy*, 962 F.2d at 57 ("[W]hen a union *waives* its right to bargain about a particular matter, it surrenders the opportunity to create a set of contractual rules that bind the employer, and instead cedes full discretion to the employer on that matter. For that reason, the courts require 'clear and unmistakable' evidence of waiver and have tended to construe waivers narrowly.") (citing *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708-09 (1983)). Moreover, this Court agrees that "[a] waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter...." *NLRB v. USPS*, 8 F.3d 832, 836 (D.C. Cir. 1993) (quoting *Dep't of Navy*, 962 F.2d at 57).

It is only in cases "[w]here the contract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining," that the Court refuses to apply a "clear and unmistakable" standard. *See Dep't of Navy*, 962 F.2d at 57. In such cases, this Court has said, "it is incorrect to say the union has 'waived' its statutory right to bargain; rather, the contract will control and the 'clear and unmistakable' intent standard is irrelevant." *Local Union No. 47, Int'l Bhd. of Elec. Workers v. NLRB*, 927 F.2d 635, 641 (D.C. Cir. 1991) (citing *United Mine Workers of Am., Dist. 31 v. NLRB*, 879 F.2d 939, 944 (D.C. Cir. 1989)). A "union may exercise its right to bargain about a particular subject by negotiating

for a provision in the collective bargaining contract that fixes the parties' rights and forecloses further mandatory bargaining as to that subject." *Id.* at 640.

It must also be emphasized that the Court has not established "a definitive test for determining when an otherwise bargainable matter is 'covered by' a . . . collective bargaining agreement, such that there is no further duty on the part of the [employer] to engage in 'impact and implementation' bargaining with respect to that matter." *Dep't of Navy*, 962 F.2d at 62. This is because the focus of the inquiry is the parties' intent, which the Court discerns through contract interpretation and bargaining history, to the extent such history is relevant. *See USPS,* 8 F. 3d at 837; *Enloe*, 433 F.3d at 839.

The application of the Court's so-called "covered by" approach is clear enough when the agreement fixes employee rights, as it did in *Department of Navy,* a case that dealt with a statutory right to "effects and implementation" bargaining. In such cases, it may be fairly argued that the union exercised its right to bargain and the employer fulfilled its bargaining obligation. *Dep't of Navy*, 962 F.2d at 57 ("When parties bargain about a subject and memorialize the results of their negotiation in a collective bargaining agreement, they create a set of enforceable rules - a new code of conduct for themselves - on that subject."). However, confusion sets in when the employer's claim is that the agreement fixed only its right to act unilaterally. Such claim is a claim of waiver. To apply the "covered by" analysis in such a case is to ignore binding precedent and the unchallenged principle

that a waiver must be "clear and unmistakable." To apply such analysis and to expansively define "covered by" when an employer has made changes the union did not foresee is to ignore the underpinnings of the contract coverage analysis—that the parties already bargained over that very subject. *See*, *e.g., Local Union 36, Int'l Bhd. of Elec. Workers v. NLRB,* 706 F.3d 73, 84-85 (2d Cir. 2013), *cert. denied,* 134 S. Ct. 2898 (2014) (refusing to adopt this Court's reasoning in *Enloe* on the grounds that it is inconsistent with *Metropolitan Edison* and can lead to the unwitting relinquishment of rights).

As the Supreme Court has recognized, sometimes in collective bargaining the parties spell out all of their rights and duties and sometimes they choose not to:

> The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time. Because of the compulsion to reach agreement and the breadth of matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, "a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith.

United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960) (citing Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1004-1005 (1955)).

In every case what matters is the parties' intent. Before concluding that the parties intended to foreclose bargaining over changes made during the term of the

Agreement, the Court must ensure that such conclusion is consistent with the whole agreement. The Court must not apply presumptions that resemble a new standard whereby a union must "clearly and unmistakably" reserve the right to effects bargaining. It must take into account the parties' mutual desire for a concise and readable instrument and to avoid endless bargaining over hypothetical future events or managerial decisions. It must remember that the purpose of the Act is to promote industrial peace and stability through collective bargaining, not gamesmanship or creative lawyering

As the agency charged with the duty to enforce the National Labor Relations Act, the Board is aware of its dual obligation to protect employees' right to bargain and to protect the integrity of the bargaining process, including the results thereof. For this reason, the Board will find an implied waiver of the right to bargain when an amalgam of factors support such finding. *Omaha-World Herald*, 357 N.L.R.B. 1870, 1870 (2011). However, it does so only when satisfied that the union intended clearly and unmistakably to waive such right. Whereas this Court is not bound to defer to the Board's contract interpretations, it shares the same duty to protect the right to bargain as it protects the integrity of the bargaining process.

In this case, NYU claims the Agreement fixed only its right to change job descriptions and gave employees nothing—no guarantee that they would not be written out of a job *and* no right to bargain over the effects of job description changes, including for example the process of determining how and whether they have fulfilled NYU's heightened expectations. Such assertion is a straightforward claim of waiver to which the "clear and unmistakable" standard should apply.

For its part, the Union contends that the parties agreed to meet and discuss job classifications and job descriptions during the term of the Agreement. Moreover, the Agreement only permitted NYU to add "related" duties to existing job descriptions. These provisions defeat the premise of NYU's argument. The Union did not give NYU an unfettered right to change job descriptions and did not agree to foreclose further bargaining over job description changes and the effects thereof.[2]

Given the plain terms of the Agreement, the General Counsel of the National Labor Relations Board should have alleged in its complaint that NYU was not authorized to unilaterally eliminate and combine positions with the result that employees were assigned "unrelated" duties that required different skill sets. Although the General Counsel's exercise of prosecutorial discretion was final and

[2] The management rights clause only applies to "prerogatives of management which are not expressly and specifically restricted or modified by one or more provisions of this Agreement." (JA312; JA119).

not reviewable,[3] this Court need not compound the error by refusing to enforce the Board's limited order that NYU bargain over the effects of such decision.[4] Rather, the Court should discern the parties' intent by interpreting the contract *de novo.*

II. UNDER THE PLAIN TERMS OF THE AGREEMENT, THE PARTIES INTENDED TO BARGAIN OVER THE EFFECTS OF JOB DESCRIPTION CHANGES.

Before addressing the question presented, it is necessary to discuss what changes NYU made in this case and why the Union cares. It is undisputed that NYU consolidated seven distinct library job titles into one position and the Board did not order NYU to bargain over that decision. Although the parties dispute the impact of this change on employees' terms and conditions of employment, there is no dispute that as a result of the change "stacks" employees, whose sole duty was to re-shelve books, were required to learn computer and customer service skills that were not previously expected. (JA314; JA33-38). Meanwhile, employees whose duties only involved working at a desk were required to perform the physical work of re-shelving books. (*Id.*) These changes impact all employees

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[3] *Local Union No. 36,* 706 F.3d at 87.

[4] *United Food & Commercial Workers v. NLRB*, 675 F.2d 346, 352 n.7 (D.C. Cir. 1982) ("Although the General Counsel's decision to dismiss represents an estimate of the merits of the charge and operates to foreclose Board consideration of that charge, it is not a decision on the merits with res judicata effect.").

ability to meet performance expectations and thus it impacts all employees' job security.

This case involves NYU's obligation to bargain over the impact of its decision to consolidate job titles on these employees. To discern the parties intent to reserve or foreclose bargaining over such things as training, performance evaluations, etc., the Court's analysis must begin the recognition clause which provides an important context for interpreting the Agreement.

NYU's approximately 1,500 clerical, administrative and technical employees are divided into two categories designated by code number based on the nature of their work. (JA312; JA18). Clerical and administrative employees are categorized as "Code 106" and technical employees are categorized as "Code 104." (JA312; JA86). Within those two categories, there are hundreds of job titles. (JA18; JA73). The recognition clause does not set forth with any specificity the job titles covered by the Agreement,[5] or the wage rate associated with each title. Instead, wage rates are determined by reference "grade" or "classification."

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[5] ARTICLE 1 – RECOGNITION

Pursuant to the Certification of Representative, issued by the National Labor Relations Board . . . New York University recognizes the United Staff Association at NYU, Local 3882, as the sole and exclusive bargaining agent for all full-time and regular part-time office clerical employees in Code 106, and all full-time and regular part-time laboratory/technical employees in Code 104 . . .

(JA86)

(*See* JA91-93). Although it is NYU who initially assigns the grade or classification to a title, the Agreement provides a procedure to challenge such assignment.[6]

Likewise, the Agreement allows NYU to initially define a job description.[7] This initial job description establishes "the kinds of tasks and levels of work

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[6] ARTICLE 10 – RECLASSIFICATION

A. The University will review the classification of bargaining unit jobs upon request by the Union. . . . .

B. Upon a request for reclassification, the University shall investigate and evaluate the request and shall, no later than three months after the request, inform the Union of its decision. If the request is denied, the reason shall be given to the Union. The denial of a request may be appealed to the Senior Vice President for Human Resources or his/her designee. The denial is to be accompanied by a notation of the total points awarded to the job being grieved and to the jobs the Union has asked it to be compared to, up to a limit of three such job comparisons. The University's decision shall not be grievable under Article 34 of this Agreement.

(JA93).

[7] ARTICLE 9 – JOB DESCRIPTION

A. Each employee will have a written job description. The job description will contain the principal duties of the job, the title of the employee's immediate supervisor[s], and the grade level. It will also contain the following statement:

This description is intended to illustrate the kinds of tasks and levels of work difficulty required of the position and does not necessarily include all the related specific duties and related responsibilities of the position. It does not limit the assignment of *related* duties not mentioned.

A job description may be changed to meet the operating requirements of the unit, or to reflect changes which have occurred, such as the elimination or addition of specific duties.

B. Each employee shall receive a written job description within six weeks of starting work at the University or of assuming a new position. (cont.)

difficulty" required of the position. (JA93) The Agreement permits NYU to modify a job description, by the addition of "related" duties. (Id.) This operates as an express limitation on NYU's management rights, by limiting its rights to adding "related" duties only.[8]

> C. Neither the Union nor any employee may grieve or arbitrate with respect to the content or description of any job. Arbitrators may not rely on, utilize or consider this provision for any purpose in cases arising under the provisions of this Agreement.

(JA93) (emphasis added).

[8] ARTICLE 39 – MANAGEMENT RIGHTS:

> The operation and management of the University and the supervision and direction of the employees are and shall continue to be solely and exclusively the functions and prerogatives of the University. All of the rights, functions and prerogatives of management *which are not expressly and specifically restricted or modified by one or more explicit provisions of this Agreement* are reserved and retained exclusively by the University and shall not be deemed or construed to have been modified, diminished or impaired by any past practice or course of conduct or otherwise than by express provision of this Agreement. Without in any manner limiting or affecting the generality of the foregoing, the right and power to select and hire all employees, to suspend, discipline, demote or discharge them for cause, to promote them to supervisory or other positions, to assign, transfer, supervise and direct all working forces, to maintain discipline and efficiency among them, to determine the facilities, methods, means, equipment, procedures and personnel required to conduct activities, to promulgate rules and regulations and to exercise the other customary functions of the University for the carrying on of its business and operations, are recognized as vested exclusively in the University.

(JA119-120) (emphasis added)

Given that Articles 9 and 10 allow NYU to initially determine the job description and pay classification associated with a job title, and to add "related" duties, the parties agreed in Article 11 to meet and discuss issues relating to job classifications and job descriptions that arose during the life of the Agreement.[9] That means bargain.[10] When the contract is read as a whole, it is self-evident that the Union intended for Article 11 to reserve its right to bargain over job classifications and job descriptions. For this same reason, the parties agreed in Article 9C and 10B that disputes over job descriptions and classifications would not be arbitrated. (JA93-94, Articles 9, 10, 11).[11]

The above-cited provisions defeat NYU's claim that the Agreement concluded all matters related to job descriptions. They also defeat NYU's claim

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[9] ARTICLE 11 – JOB CLASSIFICATION AND JOB DESCRIPTION MEETINGS

> Two University representatives and two Union representatives, at the request of either party, will meet at a mutually agreeable time and place, twice during each contract year, to discuss matters relating to job classification and job description. The meetings will be scheduled for two hours and any Union representative who is a member of the bargaining unit will be released from work to attend the meeting and will be paid for the time spent at the meeting.

(JA94).

[10] *Champaign Builders Supply Co.*, 361 NLRB No. 153, n.1 (2014) ("Member Miscimarra believes that the word 'discuss' in most circumstances would be intended and understood to mean bargaining....").

[11] This does not mean the Agreement is unenforceable, it only means the Union can bring a dispute directly to federal district court. *Enloe*, 433 F.3d at 838.

that by granting it the right to change job descriptions, the Union presumptively waived its right to bargain over the effects of job description changes. Because the Union specifically reserved the right to bargain over job descriptions generally, there was no need for it to separately reserve the right to bargain over the effects of job description changes.

In fact, the record in this case supports a conclusion that NYU acted outside the scope of the Agreement when it added duties to employees' job descriptions that required different skill-sets and that were *unrelated* to the duties employees performed in their previous jobs. Such conclusion renders the question whether the Agreement specifically reserved the right to effects bargaining irrelevant.

III. THE BOARD'S FINDING THAT THE EFFECTS OF NYU'S JOB DESCRIPTION CHANGES WERE NOT *DE MINIMUS* IS ENTITLED TO DEFERENCE.

Courts must uphold the Board's findings of fact if they are supported by substantial evidence in the record considered as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951).

NYU claims that it was not required to bargain because the effects of the changes were not adverse and *de minimis*. However, it admitted that the new job description is "much broader" than the old, that employees required weeks of training to learn their new duties and that eventually all employees will be required to meet its expectations. (JA136; JA29). NYU's *post-hoc* unilateral decision to

postpone full implementation is not a factor that should be considered in determining the ultimate impact on employees. Nor is evidence of NYU's direct efforts to respond to employee concerns and to minimize the effects of the change proof that the effects were not adverse or that they were *de minimis*. Rather, such bypassing of the Union proves there were effects NYU should have bargained with the Union. The reasonableness of NYU's refusal to bargain must be judged at the time of refusal, not in retrospect.

Accordingly, the Board's findings and conclusions are supported by substantial evidence. Its choice of remedy is consistent with its findings and with its rejection of NYU's argument that comments in employees' evaluations were not negative.

CONCLUSION

For the foregoing reasons, the Union respectfully requests that this Court grant the Board's cross-application for enforcement in its entirety.

Dated: August 2, 2016

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B).

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Dated: August 2, 2016

Respectfully submitted,

/s/ Katherine H. Hansen
Katherine H. Hansen

CERTIFICATE OF FILING AND SERVICE

I, Katherine H. Hansen, hereby certify pursuant to Fed. R. App. P. 25(d) that, on August 2, 2016 the foregoing Brief for Intervenor for Respondent was filed through the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

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In addition, the required paper copies have been sent to the court within the time provided by the rules.

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